

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2002-K-1989**
VERSUS * **COURT OF APPEAL**
KRISTOPHER P. GUERRA * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**
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ON APPLICATION FOR WRITS DIRECTED TO
ST. BERNARD 34TH JUDICIAL DISTRICT COURT
NO. 267-309, DIVISION "E"
Honorable Jacques A. Sanborn, Judge
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Judge Miriam G. Waltzer
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(Court composed of Judge Steven R. Plotkin, Judge Miriam G. Waltzer,
Judge Terri F. Love)

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APPLICATION FOR SUPERVISORY WRITS

COURT

**GRANTED. JUDGMENT OF THE TRIAL
REVERSED.**

The prosecution invokes our supervisory jurisdiction to review the ruling of the trial court ordering disclosure of the identity of a confidential informant. We reverse the ruling of the trial court.

STATEMENT OF THE CASE

The defendant has been charged under three separate bills of information, and thus three separate cases (267-309, 267-310, and 267-311), with possession of marijuana with the intent to distribute, possession of methadone with the intent to distribute, and possession of drug paraphernalia. On 16 September 2002 the court heard testimony in connection with a motion to suppress evidence. During the hearing, the defense moved for disclosure of the identity of the confidential informant, which motion the court granted. The State objected and gave notice of its intent to seek writs. The court set a return date of 16 October 2002 and stayed all proceedings until this Court acts on the writ.

Because this writ application did not include the pertinent transcript, supplementation was ordered. The transcript of September 16, 2002 has now been

received.

STATEMENT OF THE FACTS

The writ application, the attached search warrant, and the police report, show that within seventy-two hours of 26 July 2002 a confidential informant contacted Agent Arthur Meyer, a member of the St. Bernard Sheriff's Special Investigations Division (S.I.D.) and informed him that Kris Guerra was distributing marijuana from his residence at 3613 Delambert Street in Chalmette. The C.I. further offered to make a buy of one ounce of marijuana for \$80.00 from Guerra. Agent Hermann obtained and photocopied four twenty-dollar bills from the S.I.D. fund, which were given to the C.I. According to the warrant application, Agent Meyer instructed the C.I. to purchase \$100.00 of marijuana. The C.I. was searched, equipped with a concealed listening device, and then followed by the agents to 3613 Delambert. The agents observed the C.I. enter the residence, then depart moments later. The C.I. met the agents at the prearranged location and handed over one clear plastic bag which contained vegetable matter; it field-tested positive for THC, the active ingredient in marijuana. A background check of Kris Guerra revealed that he was on probation for possession of MDMA. The warrant was applied for and issued. The agents executed the warrant the same date, July 26, 2002.

As a result of the search, the agents seized marijuana, methadone, cash, baggies, and cell phones. Also, while executing the warrant, a person called the defendant, the officers answered, and the person on the phone arranged to come make a buy of marijuana. The person who did so, Randall Balsler, was arrested ten minutes later when

he arrived at the house to purchase two ounces of marijuana.

The motion hearing transcript confirms that the police report and search warrant accurately reflect the occurrences leading to the search and seizure of the evidence in this matter. Agent Meyer described a meeting with a C.I.; the informant stated he knew a person named Kristopher Guerra, residing at 3613 Delambert, who was distributing marijuana from the house. The C.I. offered to make a controlled buy, which he did after being outfitted with a listening device, patted down to be sure he had no weapon or contraband, and being provided with \$80 to purchase an ounce of marijuana. Agent Meyer prepared a search warrant based upon the information provided by the CI as well as the controlled buy; the subsequent search resulted in the seizure of marijuana and methadone, as well as baggies and currency. Furthermore, the agent recovered the \$80, which had been provided to the CI, from the defendant's bedroom. Agent Meyer estimated that the marijuana seized, 327 grams, had a value of approximately \$1000. Agent Meyer admitted that the methadone was in a prescription bottle which had the name of the defendant's girlfriend on it.

Agent Meyer testified at the hearing that he had not used the informant previously. He also stated during cross-examination that other officers kept the house under surveillance while he prepared the search warrant; no traffic was seen. However, after the warrant was executed, one person came to the house to purchase marijuana from the defendant. The C.I. was not compensated. Agent Meyer testified that the listening device placed on the C.I. was for the informant's safety; no tape was made. Agent Meyer stated that he monitored the audio during the buy. He heard someone say the defendant was sleeping; the C.I. said to wake him up. Then a large dog in the house began barking, and the agent could not hear the rest.

DISCUSSION

The defense counsel orally moved for disclosure of the confidential informant's identity during Agent Meyer's testimony. He argued that the C.I.'s "level of involvement in the issuance of the search warrant and the nature of his cooperation" made it necessary for a "proper defense". The prosecutor responded that the defendant was not charged with distribution, and that the C.I.'s involvement merely formed the basis of the search warrant. The prosecutor argued that the only issue for the court was whether the issuing magistrate had sufficient information before him to sign the warrant. The court ordered that the C.I.'s identity be disclosed because "he made the buy".

The trial court erred in ordering disclosure of the informant's identity. See State v. Degruy, 96-1463 (La. App. 4 Cir. 5/14/97), 696 So. 2d 580, in which this Court discussed the issue of disclosure at length. In that case, the defendant, who was charged with possession of 28 or more grams, but less than 200 grams, of cocaine, sought the identity of the confidential informant who had made a controlled buy of cocaine. The defendant pointed out that he did not match the description given by the informant of the person who had allegedly sold cocaine to the informant two days prior to the execution of the search warrant. He argued that if the identity of the informant were revealed, the informant could be called to testify that someone else stored and distributed the cocaine found at the address and that he did not live at that address; and he also argued that this would bolster his claim that he had made inculpatory statements to the police in order to protect his girlfriend. The trial court granted the defendant's motion; but, this court reversed, finding that the identity of the distributor and purchaser of the drugs on another time and date was totally irrelevant to the prosecution. The Court stated:

The right to keep the identity of the informant confidential and

undisclosed derives from the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials; preservation of their anonymity encourages citizens to fulfill that obligation. Roviaro v. U.S., 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957). Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors. Id. at 62-64, 77 S.Ct. at 629. In Roviaro the confidential informant was an active participant and state witness in the illegal transportation of narcotics and had to be disclosed. Where a government informer is the sole participant, other than the accused, in the transaction charged (emphasis supplied) and the informer was the only witness in a position to amplify or contradict the testimony of government witnesses, the confidential informant must be disclosed.

When an informant only supplies the information and does not participate in the transaction, disclosure is not required. State v. Davis, 411 So. 2d 434 (La. 1982). Participation in the alleged criminal transaction is the key; if the [informant] does not participate, the defendant cannot compel disclosure. State v. Quetant, 466 So. 2d 567 (La. App. 5th Cir. 1985); State v. Gaines, 93-1000 (La. App. 5th Cir. 3/29/94), 636 So. 2d 961.

In the instant case the confidential informant did not participate in the crime with which Degruy stands charged. Were we to allow disclosure of the identity of the informant based on the alleged mistaken identification of "Larry" in this case, the identity of every confidential informer would have to be disclosed under circumstances where a defendant claims that he made inculpatory statements for the sake of others and that the controlled buy was made from someone else. Individuals would then be unwilling to cooperate because they might be exposed and thus vulnerable, and prosecutors would dismiss cases rather than endanger informants.

Id. at p. 6-7, 696 So. 2d at 583-584 (Emphasis in original).

Under Degruy, the identity of the confidential informant should not be disclosed because the defendant is not charged with distributing drugs to him. Furthermore, in Degruy this Court implicitly recognized that the allegation of a flaw in the warrant which casts doubt on the veracity of the affiant is a distinguishing factor which might justify disclosure, Degruy, p. 5, 696 So. 2d at 583, but no such attack on the veracity of Agent

Meyer occurred in this case. Therefore, there was no basis for the trial court to order disclosure.

APPLICATION FOR SUPERVISORY WRITS
GRANTED.
JUDGMENT OF THE TRIAL COURT REVERSED.